



Date: December 8, 1997

Case No.: 95-INA-00438

***In the Matter of:***

MRS. MICHELLE BONIME,  
*Employer*

***On Behalf Of:***

MARGARET ANDREA KONG,  
*Alien*

Appearance: Franklin S. Abrams, Esq.  
For the Employer/Alien

Before: Huddleston, Lawson and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On February 14, 1994, Mrs. Michelle Bonime, Employer, filed an application for alien employment certification to enable Margaret Andrea Kong, Alien, to fill the position of Domestic Cook. the duties of the job were described as follows:

You will cook meals for family according to tastes of employer. You will prepare vegetables and meats for cooking. You will bake breads and pastries. You will prepare fancy dishes and pastries for social gatherings. You will purchase all foodstuffs. You will clean the kitchen and all kitchen equipment. You will cook adult meals and child's meals separately, according to tastes of each. Must be willing to stay late on occasion if employers, who both work, are detained and arrive home late.

The Employer required that applicants have two years of experience in the job offered or two years in the related occupation of houseworker, including cooking. The Employer also specified that any additional hours on one day will be compensated by additional time off on another day (AF 15). The job offer specified a 40-hour work week. The hours of employment are 10:30 a.m. to 7:30 p.m.

The CO issued a Notice of Findings (NOF) proposing to deny certification on October 19, 1994 (AF 59-66). The CO questioned whether the listed job duties constitute full-time employment in the context of the Employer's household and directed that the Employer clearly establish that the job, as performed in the Employer's household, constitutes full-time employment as defined in 20 C.F.R. § 656.50 (now recodified as § 656.3). The Employer was directed to provide the following evidence/documentation:

State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is cooking each meal on a daily and weekly basis.

If you are claiming that you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining in the twelve (12) calendar month period immediately preceding the filing of the application. List the dates of entertainment, the nature of the

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

entertainment, guests, the number of meals served, the time and duration of the meal, etc.

Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, etc.? If yes, list each duty and the frequency of performance.

Evidence that the employer has employed full-time cooks in the past, i.e., submit copies of tax and /or social security report forms.

Employer's letter, dated 2/25/94 states that the employer uses a cleaning service to perform general household maintenance duties, such as cleaning, laundry, vacuuming, etc. Please provide evidence to support, i.e., contracts, bills, etc.

One of the job duties is willingness 'to stay late on occasion if employers, who both work, are detained and arrive home late.' Please explain this statement and explain why it is necessary given that the cook performs no other household or child care duties.

Please indicate who performed cooking duties prior to January 1994.

Any other information that clearly establishes and demonstrates that this is a permanent, full-time job offer that the employer customarily has required.

As there is a one year old child residing in the household, provide the following:

Daily and weekly work schedule(s) of the parent(s).

Employer states that her husband owns a business in 'which I work some of the time...' She also indicates she normally takes care of her child. How will the child be cared for when both parents are absent from the home and the Cook is fully engaged in preparing meals?

(AF 63-64).

The CO also stated that the daily work hours of 10:30 a.m. to 7:30 p.m. are restrictive and unrealistic and must be amended or justified as a business necessity. 20 C.F.R. § 656.21(b)(2). The CO further stated that the two years of experience requirement for the related occupation of houseworker exceeds the three month Specific Vocation Preparation (SVP) requirement set forth in the *Dictionary of Occupational Titles*. Therefore, the Employer must reduce this requirement to three months or justify it as a business necessity. 20 C.F.R. § 656.21(b)(2). The CO also stated that the Employer must provide the lawful, job-related reasons for rejecting U.S. applicant Bertha Hill. 20 C.F.R. § 656.21(b)(6). The CO stated that Ms. Hill, who appears qualified, was interviewed but not hired pending a check of her references. The Employer stated in her

recruitment report that she was checking Ms. Hill's references and would provide a final report in about 10 days. However, a final report was not submitted.

The CO requested that the Employer respond to the following questions:

1. Did the Alien provide references prior to hire? Please provide copy of references.
2. If not, why is it now required?
3. If employer required references from the Alien prior to hire, what means were used to verify references.

(AF 59).

The Employer responded with rebuttal on November 21, 1994 (AF 66-67). Mrs. Bonime stated that the job entails cooking (75%) and babysitting (25%), and that she wishes to amend Item 13 of Part A of the application. She further stated that the working hours are a business necessity because her husband does not get home until 6 p.m. and they do not eat dinner until after his arrival. She stated that she was unable to check Ms. Hill's references and, therefore, did not file a final report. She did check the Alien's references by telephone with Ms. Ledgister. She also stated that her attorney would address point three in the NOF.

The CO issued a second NOF on December 2, 1994, proposing to deny certification (AF 68-72). The CO stated that issues regarding the rejection of Ms. Hill and restrictive hours of employment had been satisfactorily rebutted. However, the CO stated that the combined duties of cook and babysitter are not normal and customary for the job of cook in the United States; that it appears the Employer is seeking either a child monitor, whose duties include preparing meals, or a Houseworker, General, whose duties, according to the D.O.T., include child care, with no mention of time devoted to cooking. However, the SVP for these two occupations is considerably less than two years. The CO stated that it appears that the Employer is attempting to qualify the Alien under the "skilled worker" category of Domestic Cook because of the unavailability of visa numbers in the unskilled worker categories.

The Employer was instructed to amend the job duties and experience requirements or provide information and evidence that the required combination of duties is customary and standard in her household and in similar households or that they arise from a business necessity. Other un rebutted objections raised in the first NOF remained in effect.

The Employer responded with rebuttal dated January 31, 1995 (AF 75-77). Mrs Bonime stated that it is "quite customary for a cook to do occasional child care." (AF 77). She stated that it is a business necessity. She also stated that she is seeking to hire primarily a cook and the duties of a cook should determine the title of the occupation. She stated that she does have a person who cleans the house and does child care two days per week; thus, the Alien would do child care only three days per week. She stated further that she wants to hire a cook with two

years of experience. She also stated that she works part time. A daily schedule of duties for the cook was attached:

#### **DAILY SCHEDULE**

- |                        |   |   |
|------------------------|---|---|
| 10:30 a.m. to 1 p.m.   | - | Cleaning up from breakfast; preparing lunch, serving lunch, cleaning up after lunch   |
| 1 p.m. to 2 p.m.       | - | Off   |
| 2 p.m. to 4 p.m.       | - | Child care (if parent not home and domestic worker not home), or shopping. Baking, making preserves, preparing foods for future use |
| 4 p.m. to 5:30 p.m.    | - | Shopping - Supermarket, Green grocer, butcher store, fish store, bakery   |
| 5:30 p.m. to 7:30 p.m. | - | Preparing, serving and cleaning up after dinner   |

The CO issued a Final Determination denying certification on February 9, 1995 (AF 78-80). The CO stated that the Employer's schedule does not reflect full-time employment for a cook. Moreover, the Employer did not provide the requested information as to the number of meals prepared daily and weekly, the length of time required to prepare the meals, and the people for whom each meal is being prepared on a daily and weekly basis. The CO stated that the daily schedule submitted by the Employer appears unrealistic in that 2½ hours are devoted daily to cleaning up after breakfast and the preparation of lunch. Yet, it is unclear for whom the cook is preparing lunch, other than for a one-year-old child, since the husband works full time and the wife works about three days per week.

The CO further stated that the allotment of 7½ hours to 17½ hours per week for shopping was unrealistic. The CO also noted that the Employer left unsaid who takes care of the child from 10:30 a.m. to 2 p.m. and again from 4 p.m. to 7:30 p.m. on those days that the domestic worker and/or parent is not at home and the cook is performing her full-time job. The CO also stated that the Employer failed to provide the requested evidence that she uses a cleaning service to perform the general household maintenance duties. The CO stated that the Employer contradicted her letter of March 29, 1994, in which she said she uses a cleaning service (which did not normally provide child care) with her later statements that she uses a part-time domestic worker who provides child care.

The CO denied certification because the Employer failed to meet the requirements of 20 C.F.R. § 656. The Employer did not establish the full-time nature of the job opportunity. The CO determined that the other issues pertaining to the combination of duties and the SVP of related occupations were moot.

The Employer, by Counsel, requested review of the denial in a letter filed February 27, 1995 (AF 86). Counsel filed a Brief For Appellant on July 14, 1995.

## Discussion

The issue is whether the offered job is full-time employment as that term is defined by the regulations.

Section 656.3 of Title 20 of the Code of Federal Regulations defines employment as “permanent full-time work by an employee for an employer other than oneself.”

It is well settled that the employer bears the burden of proving that a position is permanent and full time. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988). In addition, when the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

The CO requested in the NOF that the Employer provide basic information about the cook’s daily and weekly duties and the identities of the people she would be cooking each meal for. In addition, information was requested about child care duties. The Employer submitted a daily work schedule for the cook, which the CO found to be unrealistic. We agree. The schedule is vague and lacks requested information as to the identities of the family members who will be present for meals. It allows 2½ hours daily for the cook to clean-up from breakfast, prepare and serve lunch, and clean-up after lunch. The Employer stated that her husband works in his own business and she works part time in the business. The Employer does not contend that they regularly eat lunch at home and has not demonstrated that preparing lunch for the Employer’s one-year-old child will occupy the allotted 2½ hours per day. Moreover, the Employer’s allocation of two to three and one-half hours per day for shopping is unrealistic. It would appear from this schedule that the cook will have time to engage in non-cooking duties during the work day. In fact, the Employer states that about 25% of the cook’s time will be devoted to child care, which is not only an inappropriate duty for a cook (*Dictionary of Occupation Titles*), it also constitutes an admission by the Employer that the offered job is not a full-time cooking position. *Jane B. Horn*, 94-INA-6 (Nov. 30 1994). Accordingly certification was properly denied.

## ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party

petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

